(1) Supreme Court, U.S.
FILED

No. 00 1 MAY 1 - 2000

In the

Supreme Court of the United States

Lester T. McCrary,

Petitioner,

v.

State of Ohio Department
of Human Services, et. al.,

Respondents

On Petition For A Writ Of Certiorari
United States Court Of Appeals
For The Sixth Circuit

Lester T. McCrary, *pro se*
2289 Wynds Court
Columbus, Ohio 43232-4242
(614) 861-2828

34 pp

QUESTIONS TO BE CONSIDERED

1). Is there individual liability under Title VII to include Retaliation as an agent of the employer the State of Ohio Department of Human Services?

2). Is there individual liability as an agent of the employer, the State of Ohio Department of Human Services, for failure to accommodate and retaliation under the American Disability Act (ADA)?

LIST OF PARTIES

1). The only party appearing in the caption of the case on the cover page is the State of Ohio Department of Human Services.

2). All other parties that do not appear in the caption of the case on the cover page are: Arnold Tompkins, Jack Alsop, Gerrit Rietveld, John Stull, Kurt Brooks, Roy Sutton, Wayne W. Sholes, Debbie Clement, Di Di Anekwe, Doug Henkel, D. Keith Nichols and Ed Negel; and, The United States of America, Dorothy Porter, and/or all successors.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States courts of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the United States courts of appeals appears at Appendix ___ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix ___ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 3, 2000.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[x] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

[ ] For cases from **state courts:**

The date on which the highest state court denied my case was _____. A copy of that decision appears at Appendix ___.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix ___.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[x] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S. Constitution
Fourteenth Amendment
Equal Protection of Laws
Federal Torts Claims Act
American Disability Act
Freedom of Information Act
Age Discrimination and Employment Act
42 U.S.C. §§ 2000 et seq., 1981, 1983 & 1985(3)
28 U.S.C. § 2671 et seq.
28 U.S.C. § 12202 & 12203
28 U.S.C. § 1257

STATEMENT OF THE CASE

The State of Ohio Department of Human Services (ODHS) and its officials has a long history of depriving the petitioner of job opportunities and privileges (not promoting as other similarly-situated Caucasian employees and denying terms and conditions of a contract because of race and age). Because of filing a charge on March 21, 1995 with the Equal Employment Opportunity Commission (EEOC), the employer created an ambiguous settlement, denied equal privileges, and the petitioner was demoted on November 6, 1995. The personnel official of ODHS who drafted job settlement also made arrangement and placement into new job. Same ODHS personnel official was aware of protected activity when drafting ambiguous EEOC settlement that made no mentioning of a probationary period. Prior to and after signing settlement another personnel official advised no probationary period. After starting job, personnel official made probationary period mandatory, training given to caucasian similarly-situated co-workers was denied, and petitioner was demoted after preparing work for as many as ten workers for six months with no complaints. Witnesses are provided.

The ODHS and its officials has implemented a plan not to afford equal privileges. The employer/ODHS and officials has failed to promote and has also denied accommodation under the American Disability Act (ADA) because of filing a charge. ODHS accommodated fellow female caucasian co-worker in allowing a non-traveling status for years but denied petitioner. The employer also satisfied other caucasian employees who requested a non-traveling status because of various illnesses or family. The petitioner suffers with a qualifying disability affected by lost of breathe/sleeping disorder. The petitioner has a Bachelor Degree in Business Administration and was able to perform job duties; had approximately 19 years of state service; was treated differently than similarly-situated caucasians accommodated under ADA and in promotional opportunities

because of race and age; denied interview for management positions, paid differently, the petitioner is African American; the petitioner application or request for reasonable accommodation under ADA, a job promotion or transfer was denied or replaced by a caucasian. The union failed to act and conspired with employer to deprive civil rights together with EEOC under color of state law and the Fourteenth Amendment. Officials of the employer/ODHS took and viewed personal diskettes against will from work area containing legal and personal documentation and gave days off with out pay for not discussing privilege content. Officials of ODHS would not stop harassment by caucasian co-worker in the use of profanity, disrespect, computer tampering, and intimidation. The employer up-graded co-workers and promoted supervisors to higher paying classification but failed to do same for petitioner who had major job responsibilities as lead auditor (act in supervisor's absence, trained new employees, reviewed and corrected co-workers' work, prepared and reviewed cost reports, maintain logs, and etc).

ODHS personnel officials intentionally promoted less qualified applicants and failed to transfer to non-traveling job (under ADA). The officials of ODHS should be held liable under Title VII and ADA together with employer as private citizens for intentionally acting willfully and maliciously, with spite and ill will, and with a reckless disregard for the Petitioner's civil rights because of his Race.

The petitioner has filed several charges against the employer/ODHS and its various officials but they will continue to discriminate. Other courts have upheld the U.S. Constitution and barred State Government from depriving guaranteed civil rights. Because of filing another charge in January 29, 1999, the employer continued implementing a practice of denying terms and conditions of an employment contract aided by the union, and the petitioner was terminated from employment on February 5, 1999.

The United States Equal Employment Opportunity Commission (EEOC) has a history of assisting the ODHS in

depriving civil rights because of his Race. When a charge of Race Discrimination is filed concerning a less qualified caucasian, the EEOC will not investigate, mediate, talk to witnesses, or refer to the United States Justice Department. Back in 1996, the Director (Porter) phoned the petitioner during the ninety day right to sue period and advised to sent additional information but waited until last two weeks to advise no finding whereby it was too late to acquire an Attorney. The EEOC will advise there is no charge, will not investigate or will not take a complaint. Investigator Jane Allen was very rude, dis-respectable, inconsiderate, and refused to take a charge and advised the Petitioner to file your own charge. Officials of the EEOC will not talk to witnesses or consider supportive evidence. The EEOC delayed in sending needed information under the Freedom of Information Act (FOIA) that could possibly be used in discovery and/or when the information is received some is not readable. The EEOC failed to investigate a charge under the American Disability Act (ADA) and to file with the U.S. Justice Department. The ODHS clearly refused to accommodated the petitioner under ADA as accommodation were made other caucasians. Supportive evidence was submitted to the EEOC but nothing was done. The ODHS and the EEOC has elected to act willfully and maliciously, with spite and ill will, and with reckless disregard for petitioner legal rights for no other known reason than his Race. There should be individual liability under ADA and the Federal Tort Claim Act for Race discrimination.

The Petitioner amended his complaint on November 17, 1998 to include additional claims of harassment. The district court and United States Court of Appeals for the Sixth Circuit did not take under consideration claims that were made in the EEOC charge to include affidavit. The Courts did not address the initial pleading of ADA claim whereby, similarly-situated caucasians were treated differently in receiving non-traveling status or promoted into non-traveling jobs. Several fellow female and male caucasian co-workers were known to be accommodated. The Courts gave final

approval of non-acceptable and unreasonable accommodations made by ODHS in traveling with hostile co-workers, apply for other jobs but failed to promote after filing applications, and retire on disability after inquiry but was denied. The Courts also failed to acknowledge that fellow similarly-situated co-workers were paid differently by ODHS. The district court advised that the memorandum contra to the motion for judgment on the pleading was difficult to decipher and that the petitioner had raised new claims, but failed to identify new claims and failed to take pleading under consideration. The court also advised that it was alright for officials of ODHS to take and view personal diskettes and to harass while under protected activity. The court failed to acknowledge a claim of retaliation because of filing with the EEOC. The court bypassed misconduct by officials of the United States' EEOC.

REASON FOR GRANTING THE PETITION

1.) This petition is to include all motions, pleading or filings to also include responses to Respondents.

2.) The District Court and the Appeals Court failed to recognized that the Defendant/Appellees had deprived the civil rights under color of state law and the Constitution's Fourteenth Amendment. The Respondents state actors acting under color of state law intentionally deprived the civil rights of the petitioner because of his Age, Sex and Race (Male/ African American) in comparison to caucasians and some younger females when denying equal privileges in a contract in accommodation under the American Disability Act (ADA), failing to promote, denying interviews for management positions, and equal rights within and the making of a Contract as similarly-situated caucasian co-workers by the Fourteenth Amendment of the Constitution and equal protection of laws. **Parratt v. Taylor, 451 U.S. 527 (1981); 42 U.S.C. § 1983**

3.) The District Court and the Appeals Court failed to recognized that the Defendant/Appellees had conspired through a conspiracy with union to deprived the civil rights under color of state law and the Constitution's Fourteenth Amendment/equal protection of laws. There was a civil conspiracy between the ODHS and the Union while working under color of state law to deprived the petitioner of his Constitutional Substantial rights under the Fourteenth Amendment equal protection of laws to work, to enjoy terms and conditions of a contract, and privacy. The petitioner was treated differently than similarly situated caucasians because of his race. A fellow caucasian co-worker signed on to the petitioner's computer and work could not be done. This same co-worker has a history of using profanity and has shown ill will toward petitioner. Supervisors would not stop his actions but reprimanded the petitioner unjustly for not discussing his legal actions with them. Several officials of the ODHS and the Union president by duress working outside the scope of their employment came down to the petitioner's work area and demanded personal diskettes containing personal legal filings and other notation without a warning and viewed them against will pretext as looking for information that would effect the state's computer system. **Griffin v. Breckenridge, 403 U.S. 88, 103-03 (1971); 42 U.S.C. § 1985(3)**

4.) There is disagreement within the Circuits as to individual liability under ADA. By Statute under 42 U.S.C. §12202, "A state shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act," and § 12203 states in relevant part that, "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge or hearing under this Act." Individual may be subject to personal liability under ADA. (6th Cir. 1994 Howe v. Hull, 873 F.Supp.72); Suits against individuals are not allowed under ADA. Relief granted is against employer (11th Cir. 1996 Fernandez v.

F.Supp.418). The District Court gave no logical reason for dismissing all the Plaintiff's claims to say the complaint failed to state a claim upon which relief can be granted. It failed to consider the claims pleaded in the initial complaint concerning ADA discharge. The Appeals Court erred saying the Appellees offered disability retirement. Then too, the Appellant has a right to decline unreasonable accommodations that ODHS made such as traveling with hostile co-worker, apply for jobs when none was posted, or when management positions were posted after making application he received no interview. The Petitioner has a qualified illness, sleeping disorder with lost of breathe at night, within the meaning of the American Disability Act (ADA). A medical statement from doctor was submitted to the employer in confidence. The petitioner more than qualified for all positions not interviewed for with a Bachelors Degree in Business Administration with a Major in Management and approximately twenty-one (21) years of state seniority in state auditing. Function as a leader Auditor overseeing work of others for approximately nine (9) years. The employer refuse to transfer or to promote as others caucasians in to a non-traveling position or stop traveling because of not being able to drive more than thirty (30) miles as advised by physician. It was requested that work to be returned office by others for review as advised by union but employer yet refused. I am aware that my caucasian counterpart was accommodated and does not travel because of illness. Morgan v. Electronic Data Systems Corp., 90 F.3d1173, 1181 (6th Cir. 1996).

5.) There is disagreement within this circuit the 6th circuit and others circuits on whether Title VII encompass individual liability. Some examples of disagreement in the circuits are: Individual cannot be held personally liable under Title VII supervisory employees are subject to suit under Title VII (6th Cir. 1999 Thomas v. Ohio Dept. of Rehabilitation and Correction, 36 F.Supp.2d 1005); Individuals charged with

responsibility of making and/or contributing to employment decisions for defendants employer may be liable as employer's agents under Title VII. (6th Cir. 1989 Kolb v. State of Ohio Dept. of Mental Retardation and Developmental Disability , Cleveland Developmental Center, F.Supp. 885). Individual defendants may be liable under Title VII only if they qualify as statutory "agents" of plaintiff's employer (8th Cir.1993 Russell v. City of Overland Police Dept. 838 F.Supp.1350); Title VII claim may not be brought against supervisory employee in his or her individual capacity. (8th Cir. Stafford v. State, 835 F. Supp. 1136); Individual employees who alleged participated in employer's discriminatory conduct could be liable in their individual capacity (2nd Cir. 1992 Bridges v. Eastman Kodac Co. 800 F.Supp.1172); Title VII claims for discrimination and retaliation would not lie against defendants in their individual capacities. (2nd Cir. 1996 Tagare v. NYNEX Network Systems Co., 921 F.Supp. 1146.) The District alleged that the Plaintiff had added additional facts in his memorandum contra the motion for judgment on the pleading. The Court did not identify additional facts. The District and Appeals Court failed recognize a violation of Title VII and § 1981. Whereby ODHS had accommodated fellow caucasian female similarly-situated co-worker with a non-traveling position. The employer had permitted other fellow caucasian co-workers non-traveling status and to even promote fellow female co-worker with diabetes not wanting to travel. The Petitioner counter part caucasian male co-worker was allowed a non-traveling status for years. The District and Appeals Courts failed also to recognize that ODHS committed an unlawful employment practices whereby the Plaintiff/Appellant pay was the same as lower level employee who's work he reviewed and corrected. The Petitioner was also a lead auditor that acted in supervisor's absence and trained new employees. The Respondents violated Title VII and § 1981 terms and conditions within the making and the enforcement of a contract because of race discrimination. A prima facie claim of a discrimination claim pursuant to §1981 requires the

same as that under Title VII. The Petitioner qualified and met minimum qualifications for all positions applied for as having twenty-one (21) years of experience with ODHS in auditing and one and one half ($1^1/_2$) years of state employment in the Dept. of Commerce as an Investigator II and a Bachelors of Business Degree in Business Administration with a Major in Management. The Petitioner is a male African American and the selected candidates are Caucasians and in most cases females. The Petitioner applications were by-passed with no interviews. **McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).** Females less than forty (40) years of age were treated differently. 29 U.S.C. § 621 et. seq. The petitioner is over forty (40) years of age and some females were less than forty (40) years of age. The McDonnell-Douglas Corp. case law also applies to age discrimination as stated above.

6.) Because of filing a charge on March 21, 1995 with the EEOC the employer made an ambiguous promise in writing, denied all privileges and demoted on November 6, 1995. Because of filing another charge on 12/8/95 with the EEOC the employer denied terms and conditions of the agreement as provided to caucasian co-workers and on July 17, 1997 refused accommodate under the American Disability Act (ADA). **EEOC. v Imperial Management Co. 777 F.Supp 1389 (WD Tenn. 1991).**

7.) The Supreme Court declined to protect a state official from qualified immunity prosecution under **42 U.S.C. §§ 1983, 1985(3) & 1981** "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the Petitioner, or if they took the action with the malicious intention to cause a deprivation of constitutional rights." The Respondents knowingly working under color of state law intentionally denied accommodation under ADA, ignoring terms and conditions of a Contract, and failing to promote in violation of civil rights because of race would violate Constitutional Laws. **Harlow v. Fitzgerald, 457 U.S.800 73 L**

Ed 2d 396, 102 S Ct. 2727(1982)

8.) The District Court erred in dismissing action against Appellees/Defendants concerning a breach of the collective bargaining agreement/Contract because of race (§ 1981). The Appellees/Defendants did not allow the Appellant to make or to have privileges within Contract, as others because of race for the working positions of Internal Auditors III. The privilege of contracting is both a liberty and a property right. The right to contract, freedom of contract, or liberty of contract exit as a necessary inference from, or corollary to, the express constitutional guarantee of rights of property. Patterson v McLean Credit Union, 491 U.S. 164, (1989)

9.) The District and Appeal Courts erred in dismissing action against Appellees/Defendants/ United States concerning the Federal Torts Claims Act (28 U.S.C. § 2671 et.seq) . The District and Appeal Courts advised District Court was without jurisdiction over a tort claim against the United States as substituted for the EEOC to include naming the Director for non-discretionary duty acting under color of federal law when working within the scope of their official authority for misconduct to include duress and negligence. Officials of the United States Equal Employment Opportunity Commission while performing non-discretionary duties has intimidated and threaten the Petitioner for filing a civil rights charge of race discrimination against them. Counsel for Respondents has sent an intimidating letter to the petitioner and placed a copy of the letter within the record of this action filed in District Court. The letter was sent to intimidate and to stop the petitioner from filing legal actions against the EEOC for unlawful acts committed by its officials such as advising the petitioner that he has no case in the face of witnesses and supportive documentation, to not take a complaint, conducting an unethical scheme to block filing a charge in federal court, not investigating or mediating, not talk to witnesses, not issue a right to sue letter, and not referring charge against the State of Ohio to the United States

Justice Department for unlawful Race Discrimination. The EEOC has conspired with the State of Ohio to deprive the Civil Rights of the Petitioner because of his Race. The officials must be treated the same as private individuals. **Bivens v. Six Unknown named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).**

CONCLUSION

Individuals charged with responsibility of making and/or contributing to employment decisions of an employer, such as the State of Ohio Department of Human Services, should be liable as employer's agents under Title VII and the American Disability Act (ADA) together with employer. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lester T. McCrary
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Appendix A

No. 99-3231

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER T. McCRARY,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
OHIO DEPARTMENT OF HUMAN SERVICES, et al.,	)	
	)	
	)	
Defendants-Appellees.	)	

Before: COLE and CLAY, Circuit Judges; BELL, District Judge.*

Lester P. McCrary appeals pro se from a district court judgment that dismissed his employment discrimination case filed under 42 U.S.C. §§ 1981, 1983, 1985, and 1986, as well as Title VII of the Civil Rights Act of 1964, the American with Disability Acts ("ADA"), the Age Discrimination in Employment Act, the Federal Tort Claims Act, the Equal Pay Act, and the Freedom of Information Act. His appeal has been referred to a panel of this court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, the panel unanimously agrees that oral argument is not needed in this case. *See* Fed. R. App. P. 34(a).

McCrary sued his employer, the Ohio Department of Human Services ("ODHS"), and several of his fellow

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* The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

employees primarily alleging that they had engaged in a conspiracy to harass him. He also sued the Equal Employment Opportunity Commission ("EEOC") and the agents who were involved in the administrative review of his discrimination claims, primarily alleging that they had failed to bring charges against the ODHS. The district court granted the defendants' motions to dismiss on February 11, 1999, and it is from this judgment that McCrary now appeals.

We review the dismissal of McCrary's case *de novo*. *See Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir. 1994). The court must construe the complaint in the light most favorable to the plaintiff,
accept all of his factual allegations as true, and determine whether he undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *See id.*

McCrary did not submit direct evidence of intentional discrimination and he did not show that he had been treated differently than similarly situated employees who did not belong to a protected class. Thus, the district court properly dismissed McCrary's claims against his employer and co-workers because his conclusory allegations were not sufficient to make out a *prima facie* case of race or age discrimination. *See Mitchell v. Toledo Hosp.*, *964* F.2d 577, 583-84 (6th Cir. 1992).

McCrary now argues that defendants retaliated against him by refusing to make a reasonable accommodation for his alleged sleeping disorder. However, his brief also indicates that the defendants tried to accommodate his disability by allowing him to travel with his co-workers, encouraging him to apply for other positions and offering him disability retirement. Therefore, the district court properly held that McCrary had not raised a cognizable claim under the ADA. *See Hankins v. The Gap, Inc.*, 84 F.3d 797, 800-01 (6th Cir. 1996). McCrary's retaliation claim is likewise unavailing because he did not allege a clear causal link between his prior lawsuits and the defendants' alleged

actions. *See Barnett v. Department of Veterans Affairs*, 153 F.3d 338, 343 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 875 (1999).

McCrary also argues that the district court dismissed his claims against the EEOC and its agents merely because his response to their dismissal motion was untimely. However, the record shows that the court properly dismissed McCrary's discrimination claims against these defendants for lack of jurisdiction. *See Baba v. Japan Travel Bureau, Int'l*, 111 F.3d 2, 6 (2d Cir 1997).

Accordingly, the district court's judgment is affirmed. *See* Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/s Clerk

Appendix B

UNITED STATES DISTRICT COURT
Southern District of Ohio Eastern Division

JUDGMENT IN A CIVIL CASE

LESTER T. McCRARY,
Plaintiff,

vs

Case No. C2-98-519
Judge Smith
Magistrate Judge Kemp

OHIO DEPARTMENT OF HUMAN SERVICES, et al.,
Defendants.

[ ] **Jury Verdict.** This action came before the Court for a trail by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trail or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[ ] **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed February 11, 1999, McCrary's claims against defendants ODHS, Alsop, Sholes, Anekwe, Nichols, Rietveld, Tompkins, Clement, Stull, Brooks, Sutton, Henkel, and Nagel are **DISMISSED WITH PREJUDICE** and the claims against defendants EEOC and Porter are **DISMISSED WITHOUT PREJUDICE. JUDGMENT** is hereby entered in favor of the defendants.

Date: February 11, 1999 **KENNETH J. MURPHY, CLERK**
By /Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Lester T. McCrary,

Plaintiff,

v.

Ohio Department of Human Services, el al.,

Defendants.

: Civil Action C-2-98-519

: JUDGE SMITH

: Magistrate Judge Kemp

ORDER

This civil rights action was filed pro se by Lester T. McCrary. The complaint alleges causes of action under 42 U.S.C. §§ 1981, 1983, 1985, and 1986, as well as title VII, the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), Federal Tort Claims Act ("FTCA"), the Equal Pay Act ("EPA"), and the Freedom of Information Act ("FOIA"). This matter is now before the Court on the following motions: (1) motion for judgment on the pleadings by defendants Ohio Department of Human Services ("ODHS"), Alsop, Anekwe, Nichols, Rietveld, Tompkins, Clement, Stull, Brooks, Sutton, Henkel, and Nagel; (2) motion to dismiss defendants Porter and the Equal Employment Opportunity Commission ("EEOC"); and (3) plaintiff's request for advisement by the Court with regard to the defendants' request for medical records, construed as a motion for a protective order. For the following reasons, plaintiff's claims will be dismissed and judgment will be entered for the defendants. The motion for a protective order will be denied as moot.

I. PROCEDURAL BACKGROUND

McCrary's original complaint was filed on May 18, 1998, and the defendants moved to dismiss the complaint on June 19, 1998. (Docs. 4 and 5, respectively). McCrary filed a mem-orandum contra the motion to dismiss, and subsequently sought to amend his complaint. (Docs. 15 and 17, respectively). Because the defendants had not filed a responsive pleading at that time, McCrary was permitted to amend his complaint "once as a matter of course" as provided by Fed. R. Civ. P. 15(a). (Doc. 19). McCrary filed as amended complaint on November 17, 1998, alleging causes of action under 42 U.S.C. §§ 1981, 1983, 1985, and 1986, as well as Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Federal Tort Claims Act, and the Freedom of Information Act. (Doc. 20). His factual allegations can be fairly sum-marized as follows.

McCrary is a 47 year old African American male who has been employed by the ODHS since 1979. Amended Complaint, ¶ 2. He is currently working as an "Accountant Examiner IV." Id. McCrary contends that various ODHS employees and administrators engaged in a conspiracy to either harass him or allow other employees to engage in such harassment. Id., ¶6. He alleges that defendant Henkel, a co-worker at the ODHS, engaged in abusive language, profanity, intimidation, disruption (i. e. talking loudly in the adjacent cubicle), and "possible tampering with" McCrary's work computer. Id., ¶7. McCrary contends that defendant Nagel, under the authority of the ODHS and defendants Alsop, Anekwe, Clement, Brooks, Sutton and Nichols, confiscated some of McCrary's computer disks which were contained in an office cubicle cabinet. Id., ¶8. McCrary complains that although copies of the disks were returned to him, the defendants failed to return the originals. Id. He contends that the defendants demanded and seized confidential information pertaining to legal actions and when he failed to provide such information, he was subject to discipline, including suspension for 13 days without pay. Id.

Although not specifically alleged, it appears that McCrary filed a complaint regarding some of these allegations with the EEOC which was handled by defendant Porter (a right to sue letter was attached to McCrary's original complaint). McCrary contends that Porter and the EEOC failed to bring charges against the ODHS and its officials and failed to pro-vide him with a copy of the ODHS's reply to the EEOC charges within a "reasonable time." Amended Complaint, ¶9. McCrary asserts that even though he "more than satisfactorily" performs his job duties, these actions were taken against him based on improper age and race discrimination. Id ., ¶¶ 10, 13. McCrary also contends that the ODHS failed to qualify him under the ADA in retaliation for having filed his previous charges with the EEOC and lawsuits in this Court. Id ., ¶ 11. Finally, McCrary asserts that the ODHS failed to promote him in violation of the EPA. Id ., ¶ 14. McCrary seeks injunctive relief as well as compensatory and punitive damages.

The defendants filed an answer, essentially denying the allegations set forth in the amended complaint. (Doc. 21). The defendants aver that the discipline to which McCrary was subject was given as a result of McCrary's own misconduct. Specifically, the defendants indicate that McCrary was given a 3-day suspension for insubordination because McCrary complained that his computer had been tampered with but then refused to cooperate with the investigation. The defendants also indicate that the 13-day suspension was imposed for improper use of his work computer, including preparation of legal documents for the instant case. On November 25, 1998, defendants ODHS and its employees (defendants Alsop, Sholes, Anekwe, Nichols, Rietveld, Tompkins, Clement, Stull, Brooks, Sutton, Henkel, and Nagel) filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). (Doc. 22). On November 27, 1998, the remaining defendants, the EEOC and Dorothy Porter, filed a motion to dismiss the complaint. (Doc. 24).

McCrary subsequently filed a document entitled

"Plaintiff's Response to Defendants' Request for Medical Record" which appears to be a request that the Court advise him as to the significance of the defendants' attempt to obtain McCrary's medical records using McCrary's record release authorization which was more than thirty days old. (Doc. 31). The Court will construe the document as a motion for a protective order. The defendants filed a reply to the document conceding that they attempted to use the authorization form, but that McCrary had altered the form by changing the one year window for obtaining the medical records to thirty days. (Doc. 32). McCrary then filed his memorandum contra motion for judgment on the pleadings filed by the ODHS and its employees and those defendants filed a reply memorandum. (Docs. 33 and 34, respectively). McCrary did not file a memorandum contra to the EEOC and defendant Porter's motion to dismiss, and the time for doing so prescribed by Local Rule 7.2 (a) (2) has expired. Thus, the motions are ripe for decision at this time.

II. APPLICABLE LEGAL STANDARD

As set forth above, defendants EEOC and Porter have filed a motion to dismiss and defendants ODHS and its employees have filed a motion for judgment on the pleadings. Upon motion by the defendants, the Court may dismiss a complaint that fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12 (b) (6). A motion to dismiss pursuant to Rule 12 (b) (6) attacks the sufficiency of the complaint. In addressing such a motion, the Court must determine whether, accepting all of plaintiff's allegations as true, it is beyond doubt that plaintiff can prove no set of facts in support of his claim which entitle him to relief. City of Heath, Ohio v. Ashland Oil, Inc., 834 F.Supp. 971, 975 (S.D. Ohio 1993), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Further, "the factual allegations of the complaint must not only be presumed true, but also liberally construed in favor of the plaintiff," Cox v. Dubois, 16 F. Supp.2d 861, 865, (S.D. Ohio 1998). The plaintiff is entitled to all favorable inferences which may be drawn from those allegations. Id., citing

Scheuer v. Rhodes, 416 U.S. 232 (1974).

Defendants ODHS and its employees bring their motion under Fed. R. Civ. P. 12 (c) which provides that, "after the pleading are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Judgment may be granted under Rule 12 (c) where the movants clearly establish that no material issue of fact remains to be resolved and that they are entitled to judgment as a matter of law. Beal v. Missouri Pac. R.R. Corp., 312 U.S. 45 (1941).

A motion for judgment on the pleading is judged under same standard of review as a motion to dismiss for failure to state a claim. Orick v. Banziger, 945 F. Supp. 1084 (S.D. Ohio 1996). Given this standard, the motion may be granted only if the moving party is clearly entitled to judgment. Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 479 F.2d 478 (6th Cir. 1973).

Here, McCrary proceeds in this matter *pro se*. Although the above standards for dismissal still apply, it must be remembered that *pro se* complaints and other documents, "however inartfully pleaded," are held to "less stringent standards than formal pleadings drafted by lawyers," and are to be liberally construed. Gupta v. Terra Nitrogen Corp., 10 F.Supp.2d 879, 880 (N.D. Ohio 1998), quoting Haines v. Kerner, 404 U.S. 519, 520-21 (1972). It is with these standards in mind that defendants' motions must be decided.

III. DISCUSSION

McCrary's allegations are convoluted and difficult to decipher. His amended complaint begins as follows:

> "This is an action for compensatory, equitable relief, liquidated, adverse health effects/mental abuse and punitive damages, injunctive relief and attorney's fees brought pursuant to 42 U.S.C. §§1981, 1983, combined with Title VII & §§ 1985(3), 1985 & 1986 and the Americans With Disabilities Act, Age Discrimination in Employment Act, Equal Pay (EPA), Constitutional Law, Federal Torts Claims Act and the Freedom of Information Act."

Amended Complaint, p.1. Generally, this initial paragraph appears to be a "laundry list" of federal laws which, among other things, often provide the basis for lawsuits by individuals who believe that they been treated unfairly by an employer. McCrary does not divide his claims into separate counts nor does he appear to make an attempt to plead the specific elements of a cause of action arising under any of the various laws under which he purports to proceed. The first numbered paragraph of the amended complaint indicates that McCrary is bringing his lawsuit in this Court under federal question jurisdiction. Amended Complaint, ¶ 1. Next, McCrary identifies himself and some of the defendants against whom he wishes to bring claims (ODHS, Alsop, Sholes, Anekwe, Nichols, Rietveld, and Tompkins). Id. ¶¶ 2-5.

The first items that appears to be a factual allegation indicates that defendants Clement, Stull, Brooks, and Sutton "had knowledge and conspired in the unlawful practices and failed to stop its advancement all in retaliation. While working outside the scope of their employment, allowed others co-workers to harass the plaintiff." Id. ¶¶ 6. McCrary next contends that defendant Henkel, who is "not a member of the protected class, ***conspired with management supervisors under retaliation while involvement in protected activity knowingly or not for possible favors of harassment (abusive language, profanity, disruption [loud talking to his person in the work place at next cubicle] intimidation, possible tampering with computer asigned [sic] to Plaintiff to block work production." In addition, McCrary alleges that ODHS supervisors "will not stop his actions." Id. ¶ 7. McCrary also contends that defendant Nagel, "acting with and under the authority of state actors conspired with" defendants Alsop, Anekwe, Clement, Brooks, Sutton, and Nichols by confiscating "with out [sic] a warrant and reasonable probable cause" some computer disks that were locked in a work cubicle. He alleges that these defendants violated his constitutional rights and treated him differently

than similarly situated whites. Id. ¶ 8. McCrary contends that although he was given copies, the originals of these disks were never returned to him. According to McCrary, the disks contained "information pertaining to this and other legal actions along with personal documentation." Id. McCrary alleges that because he would not talk to the defendants about the confidential information in the contents of the disks relating to pending litigation, he was subject to discipline (a 13 day suspension). Id.

McCrary next contends that defendants Porter and the EEOC, while conspiring with the ODHS, failed "to review supportive documentation, to talk to witnesses and to bring charges against the ODHS and its officials" and that they failed to provide him with a copy of the ODHS' reply in a reasonable time. Amended Complaint, ¶ 9. He alleges that all the defendants, "individually and collectively, in their official and personal capacities" engaged in a conspiracy to deprive him of his rights because of his "race, age, sex and disability." Id. ¶ 10. McCrary contends that the ODHS defendants failed to qualify him under the ADA in retaliation for his former lawsuits and EEOC charges. ¶ 11. Finally, McCrary contends that the employer (it is assumed that "the employer" is ODHS) violated the EPA by failing to promote him while promoting other, less experienced employees. Id. ¶ 14.

A. Motion for Judgment on the Pleadings

The ODHS defendants argue that several reasons exist for granting their motion for judgment on the pleadings: (1) the amended complaint does not comply with Fed. R. Civ. P. 8(a), 8(e) (1) and 10 (b), and contains only vague and conclusory a allegations; (2) Plaintiff's claims under 42 U.S.C. §§1981, 1983 and 1985(3) against the ODHS and the individual defendants in their official capacities are barred by Eleventh Amendment sovereign immunity; (3) plaintiff's ADA "failure to accommodate" and ADEA discrimination claims are barred by Eleventh Amendment sovereign immunity; (4) the

majority of plaintiff's claims are barred by the doctrine of *res judicata* because they were already dismissed in two lawsuits in this Court; (5) plaintiff's claims under 42 U.S.C. §1983 should be dismissed for failure to state a claim because he fails to allege which substantive rights were violated; (6) plaintiff's 42 U.S.C. §1985 conspiracy claim should be dismissed because the "intra corporate conspiracy" doctrine states that there can be no § 1985 conspiracy where the conspiracy alleged is that of a single entity acting through its own employees within the scope of their employment; (7) plaintiff's Title VII claims against the individual defendants should fail because individuals cannot be held personally liable under Title VII; (8) plaintiff's ADA claim against the individual defendants should be dismissed because the individual defendants are not "employers" who can be held liable under the ADA; and (9) plaintiff's First Amendment claim should be dismissed because plaintiff's suspension for failure to cooperate in an investigation of his computer tampering charges does not implicate free speech concerns.

Although it is difficult to decipher, McCrary's memorandum contra to the motion for judgment on the pleadings appears to raise new factual allegations not set forth in the amended complaint. Fed. R. 12(c), the rule governing motions for judgment on the pleadings, permits the court to treat such a motion as a motion for summary judgment under Fed. R. Civ. P. 56 in such cases where "matters outside the pleadings are presented to and not excluded by the court." In the instant case, McCrary, despite having the opportunity to do so, has presented no matters outside of the pleadings which would be the proper subject of consideration under Fed. R. Civ. P. 56. Rule 56 provides that summary judgment may be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits" show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. To the extent that McCrary has attempted to add new factual allegations in his memorandum

contra the motion for judgment on the pleadings, these will not be considered in ruling on the motion for judgment on the pleadings or motion to dismiss.

The Court does not find it necessary to address individually each argument set forth by the defendants in their motion for judgment on the pleadings because McCrary's amended complaint fails to state a claim upon which relief may be granted. McCrary alleges that he was harassed by co-workers, but he gives no specific factual allegations of such harassment. Moreover, he provides no proposed nexus between any harassment he may have experienced and his race, age, or disability. Accepting as true McCrary's allegation that defendant Henkel engaged in abusive language, profanity and disruption (i.e. talking loudly in the next cubicle), these actions do not rise to the level of a constitutional violation and there is no alleged nexus linking these actions with McCrary's race, age, or disability. McCrary also appears to contend that defendant Henkel engaged in "possible tampering" with his work computer. That allegation is also too tenuous to form the basis of a lawsuit. Although McCrary alleges that some computer disks were confiscated from his work cubicle, he also avers that the contents of the disks were returned to him. McCrary also pleads nothing that would suggest he was disciplined, not promoted, or compensated disproportionately on account of his race, age, or disability. Finally, although McCrary accuses the ODHS of failing to qualify him under the ADA, he never indicates in the his amended complaint what disability he suffers from or what steps he has taken to obtain accommodation from ODHS for his disability.

Keeping in mind the liberal standard to which *pro se* litigants are entitled, and accepting all of McCrary's allegations as true for the purposes of this motion, it appears beyond doubt that he can not prove no set of facts which would entitle him to relief against the ODHS or its employees. McCrary's claims against the ODHS and defendants Alsop, Sholes, Anekwe, Nichols, Rietveld, Tompkins, Clement, Stull,

Brooks, Sutton, Henkel, and Nagel will be dismissed with prejudice.

B. Motion to Dismiss

Defendants Porter and the EEOC raise four arguments in support of dismissal: (1) plaintiff fails to state a claim upon which relief may be granted; (2) the Court lacks subject matter jurisdiction over the EEOC and Porter; (3) plaintiff's monetary claim is barred by sovereign immunity; and (4) plaintiff's FOIA claim is moot. Similar to the discussion above, the Court need not address every argument raised in the this motion because it agrees with the defendants that it lacks subject matter jurisdiction over McCrary's claims against the EEOC and Porter and that his FIOA claim is moot.

McCrary essentially alleges that he was dissatisfied with the manner in which the EEOC and its agent, Porter, handled his claims against the ODHS and its employees. However, the EEOC and its agents may not be held liable to an employee for allegedly discriminatory or otherwise improper resolution of the employee's discrimination charges against an employer. Golyar v. McCausland, 738 F.Supp. 1090, 1093 (W.D. Mich. 1990). The *pro se* plaintiff in Golyar, like McCrary, brought claims the EEOC for discrimination based on race, age, and disability based, in part, on the EEOC's failure to enter a resolution in his favor and failure to satisfactorily investigate his claim. Id. at 1092-93. The court noted that a plaintiff's remedy lies in the actual agency he believes has discriminated against him, not the agency charged with the administrative review of discrimination charges. Id. at 1092, citing McCottrell v. E.E.O.C., 726 F.2d 350, 352 (7th Cir. 1983). Additionally, neither Title VII, the ADEA, nor the Rehabilitation Act (the ADA had not yet been enacted at the time of the Golyar decision) provide a right of action against the EEOC. Golyar, 738 F.Supp. at 1093-96.

The only other specific allegation against the EEOC and Porter appears to be a FOIA claim that the EEOC failed to provide McCrary with a copy of ODHS' reply to his EEOC

charges within a reasonable time. However, McCrary's FOIA claim fails because he essentially admits in his complaint that he received a copy of ODHS' response, but not in what he perceived to be a "reasonable time." The FOIA provides for a private right of action to compel a federal agency to disclose certain information, but does not provide a private right of action for money damages for delay in producing the requested documents. Daniels v. St. Louis VA Regional Office, 561 F.Supp. 250 (E.D. Mo. 1983).

As it appears that McCrary has received the documents he requested from the EEOC, his FOIA claim is moot. Additionally, This Court lacks subject matter jurisdiction to hear McCrary's other claims against Porter or the EEOC. Thus, McCrary's claims against defendant Porter and the EEOC under the FOIA will be dismissed without prejudice.

C. Motion for a Protective Order

Because McCrary's claims will be dismissed, the document entitled "Plaintiff's Response to Defendants' Request for Medical Record," construed as a motion for protective order, will be denied as moot.

IV. CONCLUSION

For the foregoing reasons, McCrary's motion for a protective order (Doc. 31) is DENIED as MOOT. The motion for judgment on the pleadings (Doc. 22) and the motion to dismiss (Doc. 24) are GRANTED. McCrary's claims against defendants ODHS, Alsop, Sholes, Anekwe, Nichols, Rietveld, Tompkins, Clement, Stull, Brooks, Sutton, Henkel, and Nagel are DISMISSED WITH PREJUDICE and the claims against defendants EEOC and Porter are DISMISSED WITHOUT PREJUDICE. The Clerk is directed to enter judgment in favor of the defendants.

s/ George C. Smith
United States District Judge